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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

CC Docket No. 96-98

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COMMENTS OF BELL ATLANTIC

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SUMMARY

By moving rapidly forward to implement the local competition provisions of the new Act, this proceeding promises to lay the groundwork for the introduction of new competition in all segments of the telecommunications business. As a result, while the focus of this proceeding is on the local competition provisions of the Act, it is important to view the issues addressed here in a broader context. Ultimately, Congress's objective was to introduce new facilities-based competition for both local and long distance services alike.

As Congress itself concluded, the best way to achieve this objective is to require local exchange carriers to negotiate interconnection agreements with competing local telephone providers, subject to the broad guidelines provided by the Act. This process is underway, and substantial progress is being made. Any rules adopted by the Commission here should be limited to broad guidelines that will allow the negotiation process to work as Congress intended. It should not adopt detailed prescriptive rules that would prejudice the results of those negotiations or preempt the authority of the states. Indeed, adopting detailed prescriptive rules -- as urged by the long distance incumbents who are intent on blocking long distance competition, for example -- would run afoul of the legislative scheme in the 1996 Act, and are beyond the Commission's jurisdiction.

As the Commission correctly recognizes, however, section 251 cannot be invoked by long distance carriers or others to circumvent the Commission's existing access charge regime when they deliver toll calls for completion over the LEC's networks. On the contrary, the purpose of section 251 is to promote competition for

local telephone services, and applying section 251 to interexchange access would be contrary to the Act. It also would be bad public policy since it would eliminate much of the contribution that access revenues historically have made to covering the total costs incurred by the LECs to construct and operate their ubiquitous networks. Moreover, this conclusion applies equally whether an interconnector hands off interexchange calls for termination over a LEC's network, and when an interconnector uses unbundled network elements to deliver interexchange traffic. Under either scenario, the interconnector must pay the existing access rates, at least on an interim basis until those rates are superseded through access charge reform.

The Commission should not usurp the process of negotiation and state review by prescribing exhaustive interconnection and unbundling requirements, and should limit its rules to defining an initial set of items that have been proven in the marketplace to be technically feasible today. These items generally consist of the interconnection points identified in the notice as those in use today, and of unbundled loops, switch ports, transport, and signaling systems and databases necessary for call routing and completion. This initial set should not, however, include additional interconnection points or unbundled elements -- such as loop sub-elements or the ill-defined and ever changing "switching platform" promoted by the long distance incumbents -- that have never even been tried, let alone proven to be feasible under real world operating conditions, and that would require development of additional equipment or operating systems. Instead, additional interconnection points and unbundled network elements can be developed through a bona fide request procedure

that imposes concrete deadlines on the incumbent carrier to ensure a prompt response, and incorporates safeguards to prevent requesting carriers from gaming the process to forestall long distance competition.

The pricing of interconnection and unbundled network elements is expressly left by the Act to negotiation and to the states. Under the pricing standard that applies in this context, the LECs must be permitted to recover the total costs of constructing and operating their ubiquitous networks -- including a contribution to their joint and common costs, as well as any unrecovered historical costs. Any other approach would not allow LEC's to recover their total costs plus an opportunity to earn a reasonable profit as the Act, the Constitution and sound economics all require.

The Act also requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of local calls that originate on the network of another local carrier. The pricing standard that accompanies this requirement -- to be applied by state commissions in any arbitration proceeding -- provides that, at a minimum, the parties to such an arrangement must be permitted to recover their costs on a reciprocal basis. While the Act does provide a limited exception to this general rule where the parties voluntarily waive this right, it does not allow arrangements such as bill and keep that deny the parties the ability to recover their costs to be imposed by regulatory mandate. Moreover, by denying LECs any compensation for competitor's use of their networks, a mandatory bill and keep arrangement would constitute a taking in violation of the Fifth Amendment.

In contrast, the resale pricing provision of the Act requires LECs to make services available for resale at their retail rate, less avoided costs. Because LECs will incur additional costs to make their services available at wholesale, however, the discount for wholesale services must be based upon the LECs' net avoided costs. Moreover, because residential rates are routinely provided at artificially low rates, and often below cost, any guidelines adopted by the Commission here should preserve the flexibility of the states to impose reasonable class of service restrictions to prevent other carriers from buying these low priced services and reselling them to business or other classes of customers. In addition, LECs should not be required to provide discounts or promotional offerings at a further discount for resale. Imposing a discount obligation for these services would deter carriers from offering them in the first place, and serve only to limit, rather than promote, competition.

Finally, there is no need for regulators to intervene in the negotiations process in order to establish national guidelines on what constitutes good faith negotiations -- a concept that already is well-defined in other areas of the law. On the contrary, negotiations with those local interconnectors who are interested in actually entering the market to compete are progressing well, and any intervention by regulators would only lead to posturing by the parties and produce delay.

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As Congress itself concluded, the best way to achieve this objective is to require local exchange carriers to negotiate interconnection agreements with competing local telephone providers, subject to the broad guidelines provided by the Act. This process is underway, and substantial progress is being made. Consequently, the Commission should limit any rules adopted here to broad guidelines that will allow the negotiation process to work as Congress

¹ The Bell Atlantic telephone companies are Bell Atlantic - Delaware, Inc., Bell Atlantic - District of Columbia, Inc., Bell Atlantic - Maryland, Inc., Bell Atlantic - New Jersey, Inc., Bell Atlantic - Pennsylvania, Inc., Bell Atlantic - Virginia, Inc., and Bell Atlantic - West Virginia, Inc.

intended, and not adopt detailed prescriptive rules that prejudice the results of those negotiations or preempt the authority of the states.

II. The Commission's Jurisdiction Over Intrastate Interconnection and Other Matters Addressed By Section 251 Remains Narrowly Limited

The Commission should adopt rules here that will encourage negotiated agreements. It should not adopt rules that preempt negotiators or the states, or that effectively hamstring them. Moreover, where states have already acted, the Commission should not preempt them. Arrangements for the interconnection of competing local telephone networks, for access to elements of the LECs' uniquely intrastate networks, for resale of intrastate telecommunications services, and the standards for pricing these various arrangements, all are fundamentally intrastate matters. To the extent the Commission proposes here to adopt detailed "national" rules to implement these provisions -- for example, by requiring LECs to unbundle elements of their local networks in ways that have never been required by state commissions and that never even have been tried, or by setting prices for intrastate arrangements -- its proposals are contrary to the Act in two separate respects.

First, in the 1996 Act, Congress adopted a legislative scheme carefully crafted to favor negotiated interconnection agreements over regulation, with the results of those negotiations subject to state review. The notice, in contrast, proposes to prescribe the result of the negotiations before they even begin on virtually every issue covered by section 251 -- including prescribing interconnection points, defining particular network elements that have to be provided on an unbundled basis and how, dictating standards for resale arrangements, and even prescribing rules to determine price. NPRM at ¶¶ 56, 74, 83, 117. It proposes to do so,

moreover, without regard to whether its prescribed result is anything that legitimate new entrants actually need in order to enter the market and to compete. This leaves little to be addressed in negotiations between the parties or by the states, and in this respect directly conflicts with the Congressional design.

Of at least equal importance, prescribing detailed rules in advance runs the risk of allowing parties interested only in blocking long distance competition to game the regulatory process to their anticompetitive advantage. By hoodwinking the Commission into adopting detailed requirements that go well beyond what legitimate local entrants need, or can even use, the long distance industry will try to misuse Commission processes to erect barriers to competitive entry. The result would be to frustrate the core purpose that underlies the Act: a Congressional resolve to inject additional competition into all segments of the communications industry. See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 1, 113 (1996) (“Conf. Report”) (“[T]o provide for a pro-competitive, de-regulatory national policy framework.... by opening all telecommunications markets to competition.”) (emphasis added). To the extent the long distance incumbents are able to achieve this result, consumers will be denied the benefits of additional competition in the long distance market, and the public interest will be affirmatively harmed.

The reason for the manifest Congressional preference for negotiations subject to state review is straightforward: negotiated agreements between private parties invariably will produce results better than anything that can be produced by regulatory fiat. Given the predominantly intrastate nature of the matters addressed by section 251, moreover, the legislative scheme of the 1996 Act expressly leaves review of any negotiated agreements, as well as the

resolution of any disputes that may arise, to the jurisdiction of state regulatory commissions. 47 U.S.C. § 252.

Second, prescribing national rules that preempt state authority over the fundamentally intrastate matters covered by section 251 would substantially overstep the bounds of the Commission's statutory authority. The Commission's jurisdiction is bounded by section 2(b) of the Communications Act, which provides that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b). By its plain terms, this provision -- left undisturbed by the 1996 Act -- flatly contradicts the Commission's apparent operating assumption here. It precludes any inference that Congress intended the Commission to promulgate "national rules" displacing exclusive state regulatory jurisdiction over intrastate services. Certainly, no provision of the 1996 Act expressly empowers the Commission to regulate the intrastate aspects of local exchange competition; nor, in light of section 2(b), may the Act be construed to imply any such jurisdictional expansion.

The cursory treatment afforded section 2(b) by the notice, which summarily concludes that "we believe Congress intended for section 251 to take precedence over any contrary implications based on section 2(b)," NPRM at ¶ 39, does not adequately reckon with the restrictions imposed by that provision. On the contrary, the notice has it exactly backwards; it is the express limitation of section 2(b) that must take precedence over any contrary implications that theoretically might be gleaned from section 251. As the Supreme Court held in comparable circumstances, section 2(b) "constitutes. . . a congressional denial of power to the

FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes.” Louisiana Public Service Comm’n v. FCC, 476 U.S. 355, 374 (1986) (emphasis in original). Much as the notice asserts here that the specific provisions of section 251 override section 2(b), the Commission argued there that section 220 “deals specifically and expressly with depreciation” and should therefore trump the general jurisdictional restriction imposed by section 2(b). *Id.* at 376. The Court’s response to that argument bars the Commission’s similar theory here:

a. First, the Court held that, because section 220 does not expressly address intrastate service, it does not override the jurisdictional division imposed by section 2(b): “[D]espite the sweeping language of § 220, nowhere does it even allude to, let alone expressly refer to, depreciation as a component of state ratemaking. Nor is the word ‘pre-emption’ used.” *Id.* at 377. The same observations apply here. As the notice acknowledges, neither section 251 nor section 252 makes any “specific reference to intrastate service,” NPRM at ¶ 37, and neither uses the word “preemption.” On the contrary, Congress went out of its way in section 251 to preserve the authority of state commissions to regulate intrastate arrangements in a manner “consistent with the requirements of this section.”²

² Congress made plain in the 1996 Act that it envisioned a far broader role for the states in regulating intrastate interconnection and related issues than the notice contemplates. In section 251 itself, Congress specifically instructed the Commission that its rules must “not preclude the enforcement of any regulation, order, or policy of a State commission” so long as it is consistent with section 251 and “does not substantially prevent implementation” of the requirements of section 251 or the purposes of sections 251-261. 47 U.S.C. § 251(d)(3). Congress reiterated the point in section 261(b), where it provided that “[n]othing in this part shall be construed to prohibit any State commission” from prescribing or enforcing regulations “fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.” 47 U.S.C. § 261(b). And, just for good measure, Congress said it again, even more clearly, in section 601(c)(1) of the 1996 Act: “This Act and the amendments made by

b. Second, the Court held that the canon of statutory construction that “[s]pecific terms prevail over the general” does not apply when dealing with section 2(b). 476 U.S. at 376, n.5. According to the Court, section 2(b) (which deals with jurisdiction) and section 220 (which deals with depreciation) address “different subject[s]” and therefore “are not general or specific with respect to each other.” *Id.* Moreover, “by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, [section 2(b)] provides its own rule of statutory construction” and “presents its own specific instructions regarding the correct approach to the statute which applies to how we should read section 220.” *Id.* This same “rule of statutory construction” forecloses the notice’s reliance here on generic interpretive canons. See NPRM at ¶ 39.

c. Third, the Court held that the Commission could not circumvent section 2(b) merely because it believed that diverse state depreciation practices “will frustrate the federal policy of increasing competition in the industry,” 476 U.S. at 369, or that uniform national rules “will best effectuate [the] federal policy,” *id.* at 374. As the Court explained: “To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency the power to override Congress. This we are both unwilling and unable to do.” *Id.* at 374-75. Likewise, the preference expressed in the notice for uniform federal interconnection rules, NPRM at ¶ 37, cannot justify divesting the states of their exclusive jurisdiction over intrastate communications.

this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.” Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 143 (1996).

Given this interpretive history, the fact that the new Act did not add section 251 to the list of express exceptions to the jurisdictional rule of section 2(b) is fatal to the notice's proposed federalization of intrastate interconnection and other intrastate matters. The notice attempts to deal with this by suggesting that its proposals would still leave the states with authority to regulate "local end user rates," NPRM at ¶ 40, and that this may "explain why Congress saw no need to amend section 2(b) expressly, whereas it did see such a need in its 1993 legislation establishing commercial mobile radio service," *id.* But Louisiana Public Service Comm'n makes clear that section 2(b) is not limited to "state autonomy over the rates charged by carriers for specific services," 476 U.S. at 371. Consequently, the fact that Congress did amend section 2(b) when it eliminated the states' authority to regulate CMRS rates shows that it knows how to adjust the Act's jurisdictional allocation when it intends to make such an adjustment, and it has not done so with respect to local interconnection arrangements.

The notice nonetheless suggests that certain of section 251's provisions show that Congress intended that "the states are to follow the Commission's rules." NPRM at ¶ 38. In reality, the 1996 Act gives the state commissions plenary authority to oversee the negotiation, arbitration, and approval of interconnection agreements governing both interstate and intrastate matters. Insofar as those agreements cover wholly interstate matters, it may be reasonable to expect states to apply the Commission's rules. But there is no reason to infer that the Commission's rules also control with respect to intrastate service. On the contrary, as the D.C. Circuit has stated, "the only limit that the Supreme Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." NARUC v.

FCC, 880 F.2d 422, 429 (D.C. Cir. 1989) (emphasis in original) (invalidating FCC orders preempting state regulation of inside wiring used for both interstate and intrastate service). The Commission thus may not impose uniform national rules that would bind the states in their regulation of intrastate matters addressed by section 251 absent a demonstration that conflicting state regulation would otherwise effectively eliminate the Commission's jurisdiction over interstate interconnection -- a condition not satisfied here.

For these reasons, the Commission lacks jurisdiction to impose detailed federal rules governing intrastate interconnection. Insofar as the notice proposes to adopt such rules, its premises must be fundamentally reexamined. But even if the Commission could lawfully assert jurisdiction over intrastate service, certain of its specific proposals should be substantially modified. In the following sections, we address a number of these proposals and respond to the Commission's request for comment on them.

III. As Both a Legal and Policy Matter, Section 251 Cannot Be Applied -- Either Directly or Indirectly -- to Allow Interexchange Carriers or Others to Evade Existing Interexchange Access Charges

The Commission is correct, as a matter of both law and of sound public policy, that section 251 does not apply to the LECs' interexchange access services. But contrary to the suggestion in the notice, NPRM at ¶ 165, this conclusion applies both when an interconnector terminates interexchange calls over a LEC's network, and when an interconnector uses unbundled network elements to deliver interexchange traffic. Under either circumstance, the interconnecting carrier must pay the existing access rates, at least on an interim basis until those rates are expressly superseded through access charge reform.

A. Section 251 Does Not Apply to Interexchange Access

As the Commission correctly concludes, section 251 does not allow interexchange carriers to circumvent access rates when they deliver toll calls for completion over the LECs' networks. NPRM at ¶ 161. On the contrary, the entire purpose of section 251 is to promote competition for local telephone services, and this purpose is reflected in several provisions of section 251 itself.³ For example, section 251(c)(2)(A) applies only to interconnection "for the transmission and routing" of "telephone exchange service and exchange access (47 U.S.C. § 251(c)(2)(A));" section 251(g) preserves the FCC's existing access charge rules (including its rules governing "receipt of compensation") until they expressly are superseded through access reform (47 U.S.C. § 251(g)); and section 251(i) preserves the FCC's existing authority-- based on section 201 of the 1934 Act -- over interstate access rates and service. (47 U.S.C. § 251(i)) Against this background, it is untenable to suggest (as the incumbent long distance industry does) that Congress intended summarily to overturn the entirety of the existing access charge regime, and to leave access charges to private negotiations and to the states, without so much as acknowledging that it was doing so.

Moreover, applying section 251 to interexchange access would eliminate much of the contribution that access revenues historically have made to covering the total cost incurred by

³ This underlying purpose also explains why section 251 cannot be interpreted to apply to existing agreements between non-competing LECs in adjacent serving areas. See NPRM at ¶¶ 170-171. As the legislative history shows, section 251 was intended to apply to agreements between incumbent LECs and competing local entrants in the same service areas. See e.g., Conf. Report at 120 (the Act "sets out the specific requirements of openness and accessibility that apply to LECs as competitors enter the local market and seek access to, and interconnection with, the incumbent's network facilities") (emphasis added); *id.* (the Act's requirements "are integral to a competing provider seeking to offer local telephone services over its own facilities") (emphasis added).

the LECs to construct and operate their ubiquitous networks -- contribution that has enabled regulators to keep local exchange rates artificially low for public policy reasons. The Commission's existing access charge rules also include a number of "public policy" rate elements -- including the carrier common line charge, or "CCLC," and the residual interconnection charge, or "RIC" -- that expressly were designed to recover costs that, for the most part, are not directly attributable to particular components of the LECs' access services. For Bell Atlantic, these two rate elements alone account for nearly \$1 billion of its approximately \$2 billion in interexchange access charges. Allowing long distance carriers to circumvent access rates (and their accompanying public policy elements) would undermine the LECs' ability to provide ubiquitous service, throw large amounts of uncovered costs onto the state jurisdictions, and jeopardize universal service objectives.

B. Section 251 Does Not Allow Carriers to Circumvent Access Indirectly by Using Unbundled Network Elements

Having correctly concluded that section 251 does not apply to interexchange access, the notice nonetheless suggests that interexchange carriers and others may be free to do indirectly precisely what they are forbidden to do directly. Specifically, the notice suggests that LECs will not be allowed to assess existing access charges when carriers use unbundled network elements to deliver toll calls. NPRM at ¶ 165. This result is contrary both to the 1996 Act and to sound public policy.

As a purely legal matter, allowing interexchange carriers or others to circumvent access charges in this manner is simply inconsistent with the conclusion that section 251 does not apply to access. See, e.g., General Chemical Corp. v. United States, 817 F.2d 844, 854 (D.C. Cir.

1987) (vacating agency order as arbitrary and capricious because of “internal inconsistency in the Commission’s opinion”). Moreover, nothing in the Act or the legislative history suggests that Congress intended to allow long distance carriers to so blithely circumvent existing access charges. On the contrary, that result cannot be squared with the provision of section 251 perpetuating the existing access charge structure until expressly superseded by new access charge rules. 47 U.S.C. § 251(g).

From a policy standpoint, moreover, allowing interconnectors to avoid access charges when they use unbundled network elements to deliver toll calls produces the same harmful consequences as applying section 251 to access rates directly. Whether interconnectors buy access by the drink or by the bottle, permitting them to sidestep the public policy rate elements included in existing access rates would subvert those public policy objectives and would eliminate the contribution those rates currently provide to covering the total cost of the network. This would amount to precisely the type of “‘flash cut’ reform of access” that has been criticized by Chairman Hundt as unsound policy -- “one that simply slashes all the current contribution components from access charges in a devastating second of disruption.” Speech of Reed E. Hundt (delivered by Joe Farrell, Chief Economist), “The Telecommunications Act of 1996: Evolution Not Revolution” at 6 (May 10, 1996).

A far better approach, at least until the Commission completes its universal service and access reform proceedings, is to preserve the LEC’s ability to continue to charge access rates on toll calls that are completed using a LEC’s network. The model for this approach is in place and working today at the state level in such progressive states as Maryland and Pennsylvania, where individual calls delivered for termination on the LEC’s network are

classified as local or toll based upon a Percentage Local Use factor, or “PLU,” provided by the interconnector. The interconnector then pays the LEC a local termination charge or access charge based upon the classification of the traffic. This approach, which not only avoids the harmful consequences of eliminating access, but also has proven to be both workable in practice and effective in allowing local competitors to enter the market and to compete. The same interim solution should be adopted here pending comprehensive reform of the existing access charge rules.

Moreover, this same approach also should be used when an interconnector completes toll calls using unbundled elements of the LEC’s network. When a competing local provider completes a call using its own loop and the incumbent’s switch, it should pay the interexchange access rate, minus the carrier common line charge, which was designed primarily to contribute to the embedded cost of the local loop.⁴ Likewise, when a competing local provider completes a toll call using its own switch and the incumbent’s unbundled local loop, it should pay a cost-based rate for the unbundled loop plus the carrier common line charge that it collects from the interexchange carrier.

C. Section 251 Does Not Allow Interexchange Carriers to Rebundle
Unbundled Network Elements in Order to Evade Access and to
Circumvent the Resale Provisions of the Act

Under the most extreme version of the argument that section 251 applies to access, the long distance carriers claim that they should be allowed, without investing a dime in local exchange facilities of their own, to provide end-to-end service packages (including local,

⁴ The common line charge also recovers some costs that are unrelated to the loop, such as the cost of the LEC’s contribution to long term support. These amounts should continue to be recovered from the interconnector when it provides its own loop.

vertical and toll services) using only elements of the LECs' local networks, and should be allowed to purchase all of those elements at prices set equal to incremental cost. In effect, this would allow them to completely bypass the LECs using the LECs' own networks. This not only would evade the Commission's access charge regime, but also would deter entry by facilities-based carriers and would effectively read the separate resale provision out of the Act.

The long distance carriers base their argument on section 251(c)(3) of the Act, which requires LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3) (emphasis added). What they fail to recognize is that this provision cannot be read in isolation. Its purpose is to allow competing local providers who interconnect under section 251(c)(2) to supplement some local exchange facilities of their own -- either their own loop or their own switch -- with some facilities obtained from the incumbent LEC. This purpose is reflected in the statutory language itself, since the only way for another local carrier to obtain access to a LEC's network at any given point is by interconnecting its own local exchange facilities to those of the incumbent at that point.

The legislative history confirms that sections 251(c)(2) and (c)(3) were intended to be coextensive in their reach, and to apply only when a competing provider interconnects its own local exchange facilities with those of the incumbent. According to the Senate Report, for example, the provision requiring access to network elements clarifies the "types of interconnection" that are required. S. Rep. No. 23, 104th Cong., 1st Sess. at 21 (1995) ("Senate Report"). And the Conference Report further explains the operation of these provisions as follows: "[I]t is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities

and capabilities (e.g., central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.” Conf. Report at 148 (emphasis added).

A different result with respect to the scope of section 251(c)(3) effectively would read the resale provision out of the Act, since the long distance carriers could evade the resale provision and its separate pricing standard at will. If long distance carriers can purchase network elements at incremental cost, as they claim, that price will be below the wholesale price of retail less avoided costs for all services that are remunerative today. See 47 U.S.C. § 252(d)(3). As a result, the long distance carriers would always buy services (or groups of services collectively) that are remunerative as network elements. The separate pricing standard for resale would become meaningless if it could be evaded so easily.

Moreover, if network elements were priced at incremental cost, as the long distance carriers urge, LECs would be denied an opportunity to recover the actual cost of operating their networks. See infra pp. 10-11. Ironically, this result not only would deter new investment by the incumbent LECs, but also would discourage entry by legitimate facilities-based carriers who, like the incumbent LECs, will have to recover the joint and common costs of their own joint use facilities. If the long distance carriers can provide a complete bundle of end-to-end services paying only incremental cost, this would provide them with an insuperable advantage over any facilities-based carrier, incumbent and new entrant alike, and create a significant disincentive to investment in their respective local telephone networks.

IV. Any Commission Rules Should Be Limited to Adopting an Initial Set of Interconnection Points and Unbundled Elements that Can Be Provided Today, and Establishing a Procedure by Which the Initial Set Can Evolve

The heart of the Act's provisions designed to encourage local competition is the requirement that incumbent LECs provide interconnection to their networks and access to unbundled network elements "at any technically feasible point." 47 U.S.C. § 251(c)(2). These duties are "fulfill[ed]" by negotiating agreements in good faith with carriers who request interconnection and unbundled elements. 47 U.S.C. § 251(c)(1).

As discussed above, the Commission should not usurp the process of negotiation and state review by prescribing exhaustive interconnection and unbundling requirements in advance. Nonetheless, to the extent the Commission does adopt "national" guidelines for interconnection and access to unbundled network elements, NPRM at ¶¶ 29, 31, it is critical that the Commission's rules distinguish between those matters that are technically feasible today, and others that may (or in some instances may not) be technically feasible in the future with further developmental work. The best way to draw this distinction is for the Commission to limit any rules it adopts here to defining an initial set of items -- points of interconnection and unbundled network elements -- that have been proven to be feasible in the marketplace. In addition, the Commission should establish a bona fide request ("BFR") procedure to address requests for additional interconnection points, further network unbundling, and to accommodate changes in technology or competing carriers' needs.

A. Any Initial Set of Interconnection Points or Unbundled Network Elements Should Be Limited to Those That Are “Technically Feasible” Today and That Can Be Successfully Operated and Maintained

The definition of what is “technically feasible” is key both to the duty to provide interconnection and the duty to provide access to unbundled network elements. “Feasible” means “capable of being done, executed, or affected” and “capable of being managed, utilized, or dealt with successfully.” See Webster’s Third New International Dictionary (1993). On its face, this definition imparts a notion of contemporaneousness that should be reflected in the Commission’s rules. A point of interconnection or an unbundled network element is “technically feasible” today, therefore, if it can be successfully ordered, installed, operated, tested, maintained, administered and billed without additional development of hardware or software. If, on the other hand, new software, hardware or operating systems must be developed and deployed before an interconnection point will work, it is not currently technically feasible. Similarly, if an unbundled network element cannot be tested or maintained, it is not feasible because it could not be operated at a level of service that would either meet customers’ or the Commission’s expectations.

To give effect to this definition, any initial set of unbundled elements that is adopted by the Commission should be limited to those items that have been proven in the marketplace to be technically feasible today. As is discussed in greater detail below, these items generally consist of the interconnection points identified in the notice as those in use today, and of unbundled loops, local switch ports, transport, and signaling systems and databases necessary for call routing and completion. This initial set should not, however, include additional interconnection points or unbundled elements that have never even been tried, let alone proven to

be feasible under real world operating conditions, and that require development of additional equipment or operating systems.

Instead, additional interconnection points and unbundled network elements can be developed through the bona fide request procedure described below. That procedure is designed to allow for the development of new hardware or software if needed and to ensure that elements or interconnection points can be successfully operated, tested, and maintained. The definition of “technically feasible” therefore will not be static, but will change as technology develops and the needs of carriers evolve. NPRM at ¶ 57.

**B. Requests For Additional Points of Interconnection, or Unbundled Elements
Should Be Subject to a Bona Fide Request Procedure**

The details of a workable bona fide request procedure are spelled out elsewhere, see Comments of USTA, CC Dkt 96-98 (May 16, 1996); Albers Aff. at 19-21, and need not all be repeated here. It bears emphasizing, however, that the purpose of bona fide request process is to promote negotiated agreements for additional interconnection points and network elements. It does so by clarifying the duties of both parties to the negotiation and is expressly designed to prevent either side -- the incumbent or the requesting carrier -- from engaging in gamesmanship or stringing the process along to obtain a competitive advantage.

To ensure that the incumbent promptly responds to requests for additional items, the procedure imposes concrete deadlines and provides for the prompt resolution of any disputes that arise. Specifically, no later than 90 days after receiving a request, the incumbent must provide a formal response that includes its evaluation of the technical feasibility of providing the requested item, and an estimate of the cost to provide it. Albers Aff. at 20. Any additional evaluation that is needed must be completed within 120 days after receiving the request. Id.